IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
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	:	
v.	:	CRIMINAL No. 04-CR-819
	:	
	:	
ST. CLARENCE D. AVERY	:	

MEMORANDUM

Padova, J. **August 3, 2005**

On April 28, 2005, a jury convicted Defendant St. Clarence D. Avery of one count of honest services mail fraud and one count of unauthorized sale of government property. Presently before the Court is Defendant's Motion for Judgment of Acquittal pursuant to Federal Rule of Criminal Procedure 29 or, in the alternative, Motion for a New Trial pursuant to Federal Rule of Criminal Procedure 33. For the reasons that follow, the Motion is denied in its entirety.

I. BACKGROUND

On December 21, 2004, a grand jury returned a two-count indictment charging Defendant with one count of honest services mail fraud, in violation of 18 U.S.C. §§ 1341 & 1346, and one count of unauthorized sale of government property, in violation of 18 U.S.C. § 641. The Indictment alleged that, from in or about December 2003 to in or about January 2004, Defendant, a Staff Sergeant and Supply Specialist in the United States Army, illegally sold five military issue Point Blank Interceptor Outer Tactical Vests ("OTVs") on eBay, an internet auction site, and one pair of

military issue Small Arms Protective Inserts ("SAPIs") via e-mail.[1] After a three-day trial, the jury convicted Defendant of both counts of the Indictment.

II. DISCUSSION

In the instant Motion, Defendant argues that he is entitled to a judgment of acquittal under Rule 29 because the evidence presented by the Government at trial was insufficient to establish his guilt beyond a reasonable doubt on either count of the Indictment. Defendant alternatively contends that he is entitled to a new trial under Rule 33 because the jury's guilty verdict is contrary to the weight of the evidence; the Court erred in excluding certain evidence proffered by Defendant on hearsay grounds; and the Court erred in giving a "willful blindness" instruction to the jury.

A. Motion for Judgment of Acquittal

Defendant argues that he is entitled to a judgment of acquittal under Rule 29 because the evidence presented by the Government at trial was insufficient to establish his guilt beyond a reasonable doubt on either count of the Indictment. In deciding a motion for judgment of acquittal pursuant to Rule 29, a court must view all of the evidence introduced at trial in the light most favorable to the Government and uphold the verdict so long as "*any*

[1] The Court will collectively refer to OTVs and SAPIs as "body armor."

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Voight, 89 F.3d 1050, 1080 (3d Cir. 1996) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). The court is required to draw all reasonable inferences in favor of the jury's verdict. United States v. Smith, 294 F.3d 473, 476 (3d Cir. 2002). The court is not permitted to weigh the evidence or assess the credibility of witnesses, as both of these functions are for the jury. United States v. Casper, 956 F.2d 416, 421 (3d Cir. 1992). Thus, the defendant bears a "very heavy burden" when challenging the sufficiency of the evidence supporting a jury verdict, United States v. Coyle, 63 F.3d 1239, 1243 (3d Cir. 1995), and a finding of insufficiency "should be confined to cases where the prosecution's failure is clear." Smith, 294 F.3d at 476 (quoting United States v. Leon, 739 F.2d 885, 891 (3d Cir. 1984)).

The Government's theory at trial was that Defendant took the body armor at issue from the United States military base at Fort Bragg, North Carolina, where he was stationed, and sold it to the public through eBay and email. Defendant argues that he is entitled to a judgment of acquittal because, although it is undisputed that he sold the body armor at issue, the Government presented no direct or circumstantial evidence tending to prove

that he had taken the body armor from the United States military.[2] In response, the Government points out that it presented extensive testimonial and documentary evidence concerning, *inter alia*, Defendant's direct access to body armor, the unavailability of body armor to the general public, and actions taken by Defendant to conceal his body armor sales.

Viewed in the light most favorable to the Government, the evidence supports the following factual findings. Defendant, in his capacity as a Supply Specialist, was responsible for ordering, issuing, and inventorying body armor and other military supplies within his company of 130 soldiers. (04/25/05 N.T. at 75; 04/26/05 N.T. at 27, 91-92; Beckles Dep. at 7.) Supply Specialists obtain body armor from a civilian supply warehouse. (Beckles Dep. at 14-16.) Prior to his company's deployment to Afghanistan in November

[2] The Government does not dispute that it needed to establish that Defendant took the body armor from the United States military, as opposed to having acquired the property on the open market, to prove the honest services mail fraud count. See United States v. Antico, 275 F.3d 245, 261 (3d Cir. 2001) ("To prove [honest services mail] fraud, the evidence must establish beyond a reasonable doubt (1) the defendant's knowing and willful participation in a scheme or artifice to defraud, (2) with the specific intent to defraud, and (3) the use of the mails . . . in furtherance of the scheme.") (citation omitted). Although the Government contends that it could have proven the unauthorized sale of government property count even without establishing that Defendant took the body armor from the United States military, the Court need not resolve the issue. As discussed below, the Government presented sufficient evidence to permit the jury to reasonably infer that Defendant took the body armor from the United States military, as opposed to having acquired the items on the open market.

2002 and to Iraq in January 2004, Defendant had direct access to hundreds of pieces of body armor by virtue of his position as a Supply Specialist. (04/26/05 N.T. at 47-49; Gov't Ex. 87.) During pre-deployment periods, the procedures for issuing and returning body armor from the company's supply warehouse were not strictly followed. (04/26/05 N.T. 40-41, 43, 56-60, 81, 192-93; Gov't Ex. 87.) Captain Christopher Nyland, Defendant's company commander, testified that "things were run pretty fast and loose down at the warehouse." (04/26/05 N.T. at 82.) The body armor issued for the Afghanistan deployment was never registered in the company's property book. (Id. at 42-43, 46.)

Pursuant to defense contracts, all body armor is made exclusively for the United States military, and cannot be legally obtained by civilians. (04/25/05 N.T. at 113; 04/26/05 N.T. at 10, 14-15, 195.) Military personnel were obligated to return the body armor to the United States military upon completion of duty. (04/25/05 N.T. at 110; 04/26/05 N.T. at 10, 55, 59, 61; Beckles Dep. at 20.) Although body armor was in short supply in the military during the time period in question, any surplus body armor must be demilitarized by total destruction pursuant to the policy of the Department of Defense Reutilization and Marketing Offices. (04/26/05 at 9-10, 12, 61.) The OTVs sold by Defendant[3] were

[3] Four of the five OTVs sold by Defendant were recovered from buyers and offered into evidence at trial. The Government was unable to recover the final OTV, as well as the one pair of SAPIs,

manufactured by Point Blank Body Armor ("Point Blank") pursuant to a defense contract, sold to the United States military, and shipped to military facilities located in California, Pennsylvania, and Texas between August 2002 and September 2003.[4] (04/25/05 N.T. at 119-22; Gov't Exs. 21-24.) Several of the Government's witnesses testified that they had observed body armor being advertised for sale on eBay and other Internet sites, but there is no record in Defendant's "PayPal" account, the account to which the proceeds from his body armor sales were submitted, of his having purchased body armor on eBay. (04/26/05 N.T. at 175-76.) Although federal agents found numerous documents concerning Defendant's body armor sales during a search of his home, they did not find any receipts regarding a purchase of body armor by Defendant. (Id. at 142-43.) Two of Defendant's fellow soldiers had never before seen brand new body armor for sale in Fayetteville, North Carolina, where Defendant resided. (Id. at 60-61; Beckles Dep. 23-24.)

On December 11, 2003, Defendant sold a non-military item on

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both of which had been purchased by Mark Stuart, an Army infantry soldier, prior to his deployment to Iraq. Stuart testified that he was evacuated out of the Iraq after being wounded, and the OTV and SAPIs he purchased from Defendant were left behind. (04/25/05 N.T. at 101-02.)

[4] Point Blank assigns a unique serial number to each OTV upon manufacture. (04/25/05 N.T. at 116, 119, 121.) Once the OTVs are shipped into military custody, however, they are no longer tracked by unique serial numbers. Rather, the Army processes the OTVs in bulk by generic "National Stock Numbers" corresponding to size (i.e., small, medium, large, extra-large). (04/26/05 N.T. 11-12, 54-55; Gov't Exs. 27-28.)

eBay. (04/26/05 N.T. at 155-57; Gov't Ex. 79.) Defendant listed the item on eBay as being located at his home address in Fayetteville, shipped the item from a store in Fayetteville, and listed his home address as the return address on the shipping receipt. (04/26/05 N.T. at 155-57; Gov't Ex. 9.) On the same date, Defendant shipped one of the OTVs from the same Fayetteville store, yet he listed his mother's Philadelphia address on the shipping receipt. (04/26/05 N.T. 160-161; Gov't Exs. 6, 9.) Although there was no evidence that Defendant had ever moved from Fayetteville, he had listed the OTV on eBay as being located in Charlotte, North Carolina. (04/26/05 N.T. at 157; Gov't Ex. 79.) In subsequent sales of body armor, Defendant listed the items on eBay as being located in Philadelphia, yet the shipping documents showed that he had shipped the body armor from Fayetteville. (04/26/05 N.T. at 161, 164, 168-69; Gov't Exs. 6-8, 29, 48-49, 51, and 79.) Defendant also listed his mother's Philadelphia address as his return address on the shipping receipts for subsequent body armor sales. (Id.) The shipping receipt prepared by Defendant for the pair of SAPIs he sold lists the contents of the package as "Computer Disks and Photo Frames," yet the purchaser of the SAPIs never purchased computer disks or photo frames from Defendant. (04/25/05 N.T. at 99-100; Gov't Ex. 7.) In response to three separate inquiries by his superior officers subsequent to the sales in question, Defendant denied selling body armor on eBay.

(04/26/05 N.T. at 93-95.)

Defendant essentially contends that there are two fatal flaws in the Government's theory that he took the body armor from the United States military, as opposed to having acquired the body armor on the open market. Defendant first points to the lack of evidence that the body armor he sold was ever sent to Fort Bragg from the military facilities to which they were originally delivered by Point Blank. Based on evidence of, *inter alia*, the strict control measures employed by the military and defense contractors to prevent civilians from gaining access to body armor, Defendant's direct access to and control over hundreds of pieces of body armor prior to the sales in question, and the absence of any record of Defendant having purchased the body armor on eBay or from some other non-military source, the Court finds that jury could reasonably infer the body armor at issue had been sent to Fort Bragg from the military facilities to which they were originally delivered by Point Blank. Defendant also argues that the Government's case is undermined by the absence of evidence that any body armor was ever reporting as missing or stolen from Defendant's company. Based on evidence of, *inter alia*, Defendant's ability to access and control the property books for his company, the lack of accountability for military supplies issued from the supply warehouse during pre-deployment periods, and Defendant's attempts to conceal his body armor sales from his superior officers, the

Court finds that the jury could reasonably infer that the company's supply records, to the extent that they were maintained at all, were inaccurate. Although the Government's case did not completely foreclose the possibility that Defendant obtained the body armor at issue from a source other than the United States military, the Court concludes that the vast array of circumstantial evidence presented by the Government at trial was collectively sufficient to permit a reasonable juror to conclude beyond a reasonable doubt that Defendant took the body armor at issue from the United States military. See United States v. Sandini, 888 F.2d 300, 311 (3d Cir. 1989) ("We realize that other inferences are possible from the evidence, but that circumstance does not justify us in rejecting the jury's verdict . . . . '[T]he evidence does not need to be inconsistent with every conclusion save that of guilt if it does establish a case from which the jury can find the defendant guilty beyond a reasonable doubt.'") (quoting United States v. Cooper, 567 F.2d 252, 254 (3d Cir. 1977)). As the Government presented substantial evidence to support the jury's findings in this and all other respects, Defendant's Motion for Judgment of Acquittal is denied.

B. Motion for New Trial

Pursuant to Rule 33(a), "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). Defendant

contends that he is entitled to a new trial because the jury's guilty verdict on both counts of the Indictment was contrary to the weight of the evidence; the Court erred in excluding certain evidence proffered by Defendant on hearsay grounds; and the Court erred in giving a "willful blindness" instruction to the jury.

1. Verdict contrary to weight of evidence

Defendant argues that he is entitled to a new trial because the jury's guilty verdict on both counts of the Indictment was contrary to the weight of the evidence. A district court is empowered to order a new trial on this ground "only if it 'believes that there is a serious danger that a miscarriage of justice has occurred - that is, that an innocent person has been convicted.'" United States v. Brennan, 326 F.3d 176, 188-89 (3d Cir. 2003) (quoting United States v. Johnson, 302 F.3d 139, 150 (3d Cir. 2002)); see also United States v. Nissenbaum, Crim. A. No. 00-570-01, 2001 WL 503243, at *1 (E.D. Pa. May 8, 2001) (stating that court is permitted to grant new trial "only where the weight of the evidence preponderates so heavily against the verdict that to allow it to stand would result in a miscarriage of justice") (citations omitted). Although the court "exercises its own judgment in assessing the Government's case" under Rule 33, Brennan, 326 F.3d at 189, the court "may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." Nissenbaum, 2001 WL 503243, at *1 (citation omitted).

The Third Circuit has emphasized that "motions for a new trial based on the weight of the evidence are not favored . . . [and] are to be granted sparingly and only in exceptional cases." Gov't of the Virgin Islands v. Derricks, 810 F.2d 50, 55 (3d Cir. 1987) (citations omitted).

Having independently assessed the evidence presented by the Government at trial, the Court concludes that this is not one of the exceptional cases in which the weight of the evidence preponderates so heavily against the verdict that a new trial is necessary to avoid a miscarriage of justice. To the contrary, for substantially the same reasons set forth in support of the jury's verdict in Part II.A above, the Court finds that the jury's verdict was supported by the weight of the evidence. Accordingly, Defendant's Motion for a New Trial is denied in this respect.

2. Evidentiary ruling

Defendant also contends that he is entitled to a new trial because the Court erred in sustaining the Government's objection to the introduction of certain evidence by defense counsel during his cross-examination of one of the Government's witnesses. At trial, First Sergeant Bruce Meyers, one of Defendant's supervisors, testified that he was present during a meeting in Iraq at which Sergeant Major Michael Huffman, a superior officer, asked Defendant whether he had sold body armor on eBay.[5] (04/26/05 N.T. at 93.)

[5] The meeting took place in or about April 2004, subsequent to the body armor sales alleged in the Indictment.

According to Meyers, Defendant responded by denying that he had sold body armor on eBay. (Id. at 93-94.) On cross-examination, Meyers admitted that he could not recall "every last detail" of Huffman's meeting with Defendant. (Id. at 103.) Over the Government's objection, defense counsel sought to refresh Meyers' recollection of the meeting by presenting him with a statement attributed to Huffman in an report prepared by Kishara Gant, a Special Agent for the United States Department of Defense, who had interviewed Huffman on February 1, 2005. (Id.; see also Def.'s Mot. Ex. 1.) According to the interview report, "[Huffman] indicated that during [his] conversation [with Defendant] in Iraq, [Defendant] stated that he had purchased body armor and boots from a man in downtown Fayetteville, NC." (Def.'s Mot. Ex. 1.) The Court overruled the Government's objection and instructed Meyers to read Huffman's statement to himself. (04/26/05 N.T. at 104.) Meyers read Huffman's statement and stated that it was "incorrect." (Id.) Defense counsel thereafter sought to further cross-examine Meyers with Huffman's statement in an attempt to rebut the Government's theory that Defendant had taken the body armor from the United States military. The Government raised a hearsay objection to defense counsel's further use of Huffman's statement, and the Court sustained the Government's objection. (Id.)

Defendant does not dispute that Huffman's statement in the interview report is hearsay, i.e., "a statement, other than one

made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). Nor does Defendant contend that Huffman's statement is admissible under any of the enumerated exceptions to the hearsay rule set forth in Federal Rules of Evidence 803 and 804. Defendant instead argues that Huffman's hearsay statement is admissible under Federal Rule of Evidence 807, the residual exception to the hearsay rule. Rule 807 provides as follows:

> A statement not specifically covered by [any of the hearsay exceptions in] Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be best served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Fed. R. Evid. 807. Thus, before a hearsay statement may be admitted under Rule 807, the proponent of the statement must satisfy five requirements: "trustworthiness, materiality, probative importance, interests of justice, and notice." Coyle v. Kristjan Palusalu Mar. Co., 83 F. Supp. 2d 535, 545 (E.D. Pa. 2000), aff'd,

254 F.3d 1077 (3d Cir. 2001). Rule 807 should be invoked "very rarely, and only in exceptional circumstances," United States v. Bailey, 581 F.2d 341, 347 (3d Cir. 1978), "lest its potential breadth swallow the carefully crafted narrowness of the enumerated exceptions [in Rule 803 and 804]." Russo v. Abington Mem'l Hosp., Civ. A. No. 94-195, 1998 WL 967568, at *3 (E.D. Pa. Nov. 18, 1998)).

The first requirement for the admission of a hearsay statement under Rule 807 is that the statement possess "circumstantial guarantees of trustworthiness." Fed. R. Evid. 807. In ascertaining whether the proponent of the hearsay statement has made a sufficient showing of trustworthiness, the court's inquiry must focus on whether "the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous." Idaho v. Wright, 497 U.S. 805, 820 (1990). Relevant factors bearing on trustworthiness include: (1) whether the declarant made the statement under oath; (2) whether the declarant voluntarily made the statement; (3) whether the statement was based on the declarant's personal knowledge; (4) whether the statement contradicted a prior statement by the declarant; (5) whether the statement was videotaped in order to provide the jury with an opportunity to evaluate the declarant's demeanor; (6) the availability of the declarant for cross-examination; (7) the

proximity of time between the statement and the events described; (8) whether the statement is corroborated; (9) the declarant's motivation to fabricate the statement; (10) whether the statement is prepared in anticipation of litigation; (11) the statement's spontaneity; and (12) whether the declarant's memory or perception was faulty. Greco v. Nat'l R.R. Passenger Corp., Civ. A. No. 02-6862, 2005 WL 1320147, at *5 (E.D. Pa. June 1, 2005). Because Rule 807 "speaks of 'circumstantial *guarantees* of trustworthiness'[,] . . . . [a] *suggestion* of trustworthiness cannot suffice." United States v. Harrison, 296 F.3d 994, 1006 (10th Cir. 2002).

Defendant contends that any statement made to federal investigators by a high ranking military officer regarding a matter about which the speaker has no real incentive to lie is inherently trustworthy. The trustworthiness of Huffman's statement is compromised, however, by the fact that his statement concerned events that took place, at the very at least, ten months earlier, and while he was deployed in Iraq.[6] Moreover, Huffman's statement is contained in an interview report that he did not himself prepare, and there is no indication that the information he provided during the interview was made under oath and subject to the penalty of perjury. Because the Court cannot conclude that the

[6] Indeed, at trial, defense counsel attacked Meyers' ability to recall the details of Huffman's meeting with Defendant, noting that the meeting had taken place "about a year ago" in Iraq, where "a lot goes on." (04/26/05 N.T. at 103.)

trustworthiness of Huffman's hearsay statement is "so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility," Wright, 497 U.S. at 820, Defendant was not entitled to admit the statement into evidence pursuant to Rule 807.[7] Accordingly, Defendant's Motion for a New Trial is denied in this respect.

3. Jury instruction

Defendant also argues that he is entitled to a new trial because the Court erred in giving a "willful blindness" instruction to the jury. Defendant does not challenge the substantive language of the Court's "willful blindness" instruction. Rather, Defendant contends a "willful blindness" instruction was not justified because the Government failed prove that he deliberately avoided learning that it was illegal to sell body armor.

"A 'willful blindness' instruction allows a jury to impute the element of knowledge to the defendant if the evidence indicates that he purposely closed his eyes to avoid knowing what was taking place around him." United States v. Khorozian, 333 F.3d 498, 508 (3d Cir. 2003) (quoting United States v. Schnabel, 939 F.2d 197,

[7] Even if Defendant had made a sufficient showing of trustworthiness, the Court would still conclude that Huffman's hearsay statement was inadmissible because Defendant has failed to even address the four remaining requirements of Rule 807. In particular, Defendant has failed demonstrate that through reasonable efforts he could not procure more probative evidence (i.e., the direct testimony of Huffman) on the point at issue.

203 (4th Cir. 1991)); see also United States v. Stewart, 185 F.3d 112 (3d Cir. 1999) (upholding "willful blindness" instruction in mail fraud case). "To find knowledge premised on . . . [a] 'willful blindness' theory, the jury must be able to conclude that 'the defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability.'" United States v. Brodie, 403 F.3d 123, 148 (3d Cir. 2005) (quoting United States v. Caminos, 770 F.2d 361, 365 (3d Cir. 1985)). "A willful blindness instruction is justified when the defendant claims to lack guilty knowledge, yet the evidence, taken in the light most favorable to the government, suffices to support an inference that he deliberately shut his eyes to the true facts." Khorozian, 333 F.3d at 508 (quoting United States v. Singh, 222 F.3d 6, 11 (1st Cir. 2000)).[8]

The Court concludes that the Government presented ample

[8] Defendant does not appear to dispute that he placed his lack of guilty knowledge in issue at trial. Indeed, although Defendant did not present any evidence at trial, his theory of defense, as revealed by defense counsel's cross-examination of the Government's witnesses and closing argument to the jury, was premised in part on the Government's failure to prove that Defendant knew that it was illegal to sell the body armor. See Singh, 222 F.3d at 11 (holding that propriety of willful blindness instruction "does not depend on a showing of an explicit denial of guilty knowledge out of the defendant's own mouth . . . so long as a practical evaluation of the record reveals that the defense was pitched in that direction"). The Court's analysis of Defendant's "willful blindness" challenge is, therefore, limited to whether the Government presented sufficient evidence to justify the instruction.

evidence to justify a "willful blindness" instruction. In particular, the jury could reasonably infer from Defendant's repeated misrepresentations to his superior officers concerning his sales of body armor on eBay that he was at least willfully blind to, if not actually aware of, the illegality of his conduct. Accordingly, Defendant's Motion for a New Trial is denied in this respect.

IV. CONCLUSION

For the foregoing reasons, Defendant's Motion for Judgment of Acquittal pursuant to Federal Rule of Criminal Procedure 29 or, in the alternative, Motion for a New Trial pursuant to Federal Rule of Criminal Procedure 33 is denied in its entirety.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
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	:	
v.	:	CRIMINAL No. 04-CR-819
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	:	
ST. CLARENCE D. AVERY	:	

O R D E R

AND NOW, this 3rd day of August, 2005, upon consideration of Defendant's "Motion for Judgment of Acquittal or, in the Alternative, a New Trial" (Docs. No. 35, 41), and the Government's Response thereto, **IT IS HEREBY ORDERED** that said Motion is **DENIED** in its entirety.

BY THE COURT:

s/ John R. Padova
John R. Padova, J.